No. 22528

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES G. RUSSELL,
Appellant,

v.

PAUL H. NITZE, SECRETARY OF THE NAVY,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF IDAHO

BRIEF FOR APPELLEE

EDWIN L. WEISL, Jr.,
Assistant Attorney General,

SYLVAN A. JEPPESEN,
United States Attorney,

JOHN C. ELDRIDGE,
ROBERT M. HEIER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

I N D E X

C I T A T I O N S

Cases:

Cases continued: Page:

Statutes continued: Page

Regulations:

Miscellaneous:

Miscellaneous continued: Page

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22528

JAMES G. RUSSELL,
Appellant,

v.

PAUL H. NITZE, SECRETARY OF THE NAVY,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF IDAHO

BRIEF FOR APPELLEE

JURISDICTIONAL STATEMENT

This action was instituted in the district court on June 12, 1967, by James Russell who had been discharged from the United States Navy for engaging in homosexual conduct. Russell, admitting that he engaged in the conduct, but asserting that the Navy Discharge Review Board abused its discretion in failing to change his discharge from undesirable to general or honorable, sought an order in the nature of a writ of mandamus directing the Secretary of the Navy to change his discharge from undesirable to honorable or general. He alleged that the district court had jurisdiction under 28 U.S.C. 1361. On October 27, 1967, the district court granted summary judgment

for the Secretary on the ground that the complaint failed to state a claim under which relief could be granted (R. 101).

Notice of appeal was filed on December 22, 1967 (R. 105). This Court has jurisdiction over the appeal pursuant to 28 U.S.C. 1291.

STATEMENT OF THE CASE

A. The Pertinent Facts

On October 30, 1962, the appellant, James G. Russell, enlisted in the United States Navy for a term of four years (R. 12). After completion of the basic training program prescribed for all recruits he was transferred to the United States Naval Hospital in San Diego, California for specialized training (R. 16).

In May 1963, an investigation by the hospital's security office uncovered the possibility that Russell had engaged in homosexual conduct on Navy premises. Based upon information contained in the investigation report, Russell was called into the hospital's security office and informed that he was suspected of having engaged in homosexual conduct in violation of the Uniform Code of Military Justice, as amended, 10 U.S.C. 801 et seq. [1/] (R. 41). At that time, pursuant to regulations he was informed of his right to remain silent and advised that

---

1/ See, Art. 125 UCMJ, 10 U.S.C. 925 (sodomy); Art. 134 UCMJ, 10 U.S.C. 934 (discreditable conduct).

any statements he made could be used against him [2/] (R. 41). Nevertheless, Russell responded freely to questioning and admitted having engaged in a sodomous act with another enlisted man (R. 41).

Subsequently, on June 4, 1963, Russell executed a written statement in which he acknowledged that he had been informed of his rights under the Uniform Code of Military Justice, that he understood that he was under no obligation to make any statement whatsoever regarding the offense, and that he knew he could not be compelled to answer any incriminating questions. He also acknowledged that no force, coercion, threats, or promises had been used or made in order to induce him to issue a statement (R. 43). In the statement Russell again admitted to having engaged in homosexual activity. In sole explanation he stated that he had allowed his curiosity to affect his judgment but that throughout, he had remained the passive partner (R. 44).

Sometime after the issuance of this statement, Russell was informed that he was being considered for an administrative discharge under other than honorable conditions.[3/] On June 12, 1963,

---

2/ Bureau of Navy Personnel Manual, 32 C.F.R. 730.12; Cf., Art. 31 UCMJ, 10 U.S.C. 831.

3/ Under current Navy Regulations, 32 C.F.R. 730.1 et seq., there are five types of discharges. Three of them -- honorable, general and undesirable -- may be granted administratively. 32 C.F.R. 730.2. Two of them -- bad conduct and dishonorable -- may be given only via court-martial. Id.

about one week after issuing his first statement, Russell signed another document in which he recorded his understandin that he was being considered for a discharge under other than honorable conditions (R. 51). He stated that he had bee afforded the opportunity to request, but was expressly waivin the following rights (R. 51):

(a) to have his case heard by a board of not less than three officers

(b) to appear in person before the board

(c) to be represented by counsel.

However, the right to issue a statement in his own behalf was reserved and exercised, and on the same day, June 12, Russell issued a second statement (R. 48-50). At the beginning of the statement, he acknowledged that (R. 48):

> I have been advised that I may be discharged under other than honorable conditions and the reasons therefor. I understand such discharge may deprive me of virtually all veterans' benefits based upon my current period of active service, and that I may expect to encounter substantial prejudices in civilian life in situations wherein the type of service rendered in any branch of the Armed Forces or the character of discharge received therefrom may have a bearing.

After the foregoing, Russell again admitted freely that he had engaged in homosexual activity (R. 48-51).

On June 17, 1963, the Commanding Officer of the hospital forwarded the case to the Chief of Naval Personnel, accompani by his recommendation that Russell be given a general dischar for reasons of unfitness (R. 38). On July 1, a three member

Discharge Board, after considering the case, unanimously recommended that Russell be given an undesirable discharge by reason of unfitness (R. 36). This decision was approved by the Chief of Naval Personnel (R. 36) who, on July 15, directed that Russell be granted an undesirable discharge by reason of unfitness. On July 29, 1963, Russell was officially separated from the Navy on that basis (R. 26).

B. Proceedings Before the Navy Discharge Review Board

Three years later, on July 11, 1966, Russell applied to the Navy Discharge Review Board seeking to have the nature of his administrative discharge altered [4/] (R. 77). At that time, Russell enclosed an additional statement with his application for review, again admitting having engaged in homosexual conduct and offering the excuse of "youthful indiscretion" (R. 78). In support of his application, he offered a psychological report and statements by certain prominent members of his community (R. 77). Although he waived a personal appearance (R. 77), he did exercise the right to be represented by counsel and, in fact, was represented not only by his present counsel, Mr. Hobdey, but by appointed counsel as well (See R. 70, 79).

On August 12, 1966, Russell's appointed counsel requested that, in addition to a consideration of the record before the

---

4/ The Navy Discharge Review Board is an administrative board authorized by 10 U.S.C. 1553, supra, with authority to correct or modify the nature of any discharge or dismissal in accordance with the facts presented to it.

Board, the following factors be examined:

1. Russell's youth and immaturity,

2. his small town background and limited exposure to homosexuals, and

3. Russell's ignorance (R. 70).

No additional testimony or evidence relating to the acts in question or circumstances of discharge was offered.

By decision of August 16, 1966, the Navy Discharge Review Board determined that the character of the original discharge was proper, and that no correction or modification of the undesirable discharge was warranted. The Board stated (R. 68):

> Petitioner voluntarily admitted participating in an act of sexual perversion while in the naval service. By so doing, petitioner thereby classified himself as unfit for the close association with members of the male sex necessitated by the requirements of naval service. The Board concludes that the character of the discharge was proper. No evidence was adduced to justify any change in Petitioner's discharge.

This decision was approved by the Secretary of the Navy on September 19, 1966 (R. 68), and this action ensued.

C. Proceedings in the District Court

As noted, Russell filed his complaint on June 12, 1967 (R.1), alleging that the Discharge Review Board's refusal to change the nature of the discharge was arbitrary and capri and seeking mandamus to compel the Secretary to issue an honorable or general discharge. On October 6, the Secretary moved for summary judgment upon the grounds of lack of

In his response Russell asserted that, in view of his youth and lack of wisdom, the Navy Discharge Review Board had been arbitrary in refusing to amend the character of his discharge (R. 93, 98). Russell also contended, for the very first time, that after being advised that his commanding officer was recommending a general discharge, he decided to waive the right to counsel (R. 98). No supporting affidavits were offered.

On October 27, 1967, the district court entered summary judgment for the Secretary. In its memorandum opinion the court, noting that all administrative proceedings were conducted in full conformity with controlling administrative regulations (R. 102), held that the determination of the nature of a discharge from the armed services is a discretionary activity of the Secretary and, hence, not subject to control by mandamus. Accordingly, the complaint was dismissed for failure to state a cause of action (R. 103). This appeal followed (R. 105).

STATUTES AND REGULATIONS INVOLVED

§ 301 of the Servicemen's Readjustment Act of 1944, 58 Stat. 286, as amended, 10 U.S.C. 1553, provides:

> 1553. Review of discharge or dismissal
>
> (a) The Secretary concerned shall, after consulting the Administrator of Veterans' Affairs, establish a board of review, consisting of five members, to review the discharge or dismissal (other than a discharge or dismissal by sentence of a general court-martial) of any former member of an armed force under the jurisdiction of his

department upon its own motion or upon the request of the former member or, if he is dead, his surviving spouse, next of kin, or legal representative. A motion or request for review must be made within 15 years after the date of the discharge or dismissal.

(b) A board established under this section may, subject to review by the Secretary concerned, change a discharge or dismissal, or issue a new discharge, to reflect its findings.

(c) A review by a board established under this section shall be based on the records of the armed forces concerned and such other evidence as may be presented to the board. A witness may present evidence to the board in person or by affidavit. A person who requests a review under this section may appear before the board in person or by counsel or an accredited representative of an organization recognized by the Administrator of Veterans' Affairs under chapter 59 of title 38.

28 U.S.C. 1361 provides:

> Action to compel an officer of the United States to perform his duty
>
> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

The Bureau of Navy Personnel Manual, reprinted in the Code of Federal Regulations, provides in pertinent part:

> 32 C.F.R. 724.1 Authority
>
> A board for the review of discharges and dismissals of former personnel of the Navy and Marine Corps is established by the Secretary of the Navy pursuant to Title 10, United States Code, section 1553. To carry out the duties imposed by section 1553, administrative regulations and procedures are formulated in this part.

32 C.F.R. 724.2 Jurisdiction.

(a) In accordance with the precept of the Secretary of the Navy, the Navy Discharge Review Board, has been established within the Department of the Navy . . . .

* * *

32 C.F.R. 724.5 Methods of presenting case.

The petitioner may present his case:

(a) By affidavit and/or other documents. (See § 724.15(e) (3).)

(b) In person, with or without counsel.

(c) By counsel.

(d) Or by a combination of the above.

32 C.F.R. 724.6. Counsel.

As used in this part, the term "counsel" will be construed to include members in good standing of a Federal Bar or the Bar of any State, accredited representatives of Veterans organizations recognized by the Administrator of Veterans' Affairs under Title 38, United States Code, section 3402, and such other persons as, in the opinion of the Board, are considered to be competent to present equitably and comprehensively the request of the applicant for review, unless barred by law.

32 C.F.R. 730.10. Discharge of enlisted personnel by reason of unsuitability.

(a) Members may be separated, by reason of unsuitability, with an honorable or general discharge as warranted by their military records. A discharge by reason of unsuitability in accordance with the provisions of this section, regardless of the attendant circumstances, will be effected only when directed by or authorized by the Chief of Naval Personnel.

(b) Members may be discharged by reason of unsuitability because of:

* * *

(7) Homosexual or other aberrant tendencies.

32 C.F.R. 730.12 Discharge of enlisted personnel by reason of unfitness.

(a) Members may be separated by reason of unfitness with an undesirable discharge, or with a more creditable type discharge when it is warranted by the particular circumstances in a given case. A discharge by reason of unfitness regardless of the attendant circumstances, will be effected only when authorized by the Chief of Naval Personnel.

(b) Members whose military records are characterized by one or more of the following may be recommended for discharge by reason of unfitness:

* * *

(5) Homosexual acts. (SECNAV Instruction 1900.9 series sets forth controlling policy and additional action required in cases involving homosexuality.)

(6) Other sexual perversion including but not limited to (i) lewd and lascivious acts, (ii) sodomy, (iii) indecent exposure, (iv) indecent acts with or assault upon a child, or (v) other indecent acts or offenses.

* * *

(d) In each case processed in accordance with this section, the individual is subject to an undesirable discharge. The member must be informed in writing as to the circumstances which are the basis for the contemplated action and must be afforded an opportunity to request or waive in writing any or all of the following

privileges: (If not on active duty, this may be accomplished by registered mail.)

(1) To have his case heard by a board of not less than three officers.

(2) To appear in person before such board (unless in civil confinement or otherwise unavailable).

(3) To be represented by counsel.

(4) To submit statements in his own behalf.

(5) To waive in writing the rights listed in subparagraphs (1) to (4) of this paragraph.

Prior to declaring his intentions concerning the rights listed in this paragraph (and prior to requesting a discharge to escape trial by court-martial in cases processed under paragraph (b)(5) of this section the member shall be afforded the opportunity to consult with counsel. If the individual requests that his case be heard by a board of officers, the commanding officer shall convene a board in accordance with § 730.15. In the event the individual refuses to request or waive his privileges, make a page 13 entry of explanation in the individual's service record and forward a copy of the page 13 along with other enclosures to the Chief of Naval Personnel.

ARGUMENT

THE DISTRICT COURT CORRECTLY HELD THAT MANDAMUS WOULD NOT LIE TO COMPEL APPELLEE TO CHANGE THE CHARACTER OF APPELLANT'S DISCHARGE

Russell's main contention in this Court is that the Navy Discharge Review Board's refusal to change his discharge from undesirable to general is arbitrary and capricious because the Board refused to consider his youth and lack of wisdom, and ignored a psychological report suggesting that Russell is not a homosexual. It is also asserted that, at the time of his discharge, Russell waived the right to counsel after being informed that his Commanding Officer was recommending a genera discharge. Based on these considerations, it is urged, the district court erred in declining to compel the Secretary of the Navy to issue a general -- or honorable -- discharge.

We show below that the district court, under traditional principles of judicial review of decisions of military tribuna correctly held that mandamus would not lie in this case.

A. Judicial Review of Military Administrative Discharges Is Limited to Insuring That the Procedures and Decisions of the Military Tribunal Are Permitted By Law And Is Unavailable to Oversee Discretionary Decisions of Military Tribunals or Officials.

It is well settled that the judiciary will not normally interfere with military decisions made in pursuit of legitimat military goals. This principle was set forth by Mr. Justice J

in Orloff v. Willoughby, 345 U.S. 83, as follows:

> . . . judges are not given the task of running the Army. * * * [O]rderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters. 345 U.S. 83, 93-94.

Obviously, this refusal to oversee military matters flows from a keen awareness that judicial intervention in the internal affairs of the military could seriously undermine the high level of discipline and morale that are so indispensable to the efficient functioning of our armed forces. The Supreme Court, recognizing this, has held that -- subject to extremely limited exceptions -- decisions of duly constituted military tribunals may not be judicially reviewed. See, Quackenbush v. United States, 177 U.S. 20. The first exception is that the federal courts may inquire into the jurisdiction of the military tribunal to render the decision in question. In re Yamashita, 327 U.S. 1; In re Grimley, 137 U.S. 147; Dynes v. Hoover, 61 U.S. 65. And second, the courts may examine the decisions reached, as well as the procedures employed, to insure their permissibility under law. See Reaves v. Ainsworth, 219 U.S. 296; Johnson v. Sayre, 158 U.S. 109. But having determined that there are no defects as to jurisdiction and procedure, and that the action taken is permitted by law, judicial review is at an end. United States ex rel. French v. Weeks, 259 U.S. 326; Johnson v. Sayre, supra.

That these principles apply with equal vitality in the ar of administrative discharges cannot be doubted. Reed v. Frank 297 F. 2d 17, 20 (C.A. 4); Courtney v. Secretary of the Air Force, 267 F. Supp. 305, 311 (C.D. Calif.). See, Payson v. Franke, 282 F. 2d 851, 854 (C.A.D.C.); cf., Michaelson v. Herr 242 F. 2d 693, 696 (C.A. 2; concurring opinion of Judge Medina Gentila v. Pace, 193 F. 2d 924 (C.A.D.C.), certiorari denied 342 U.S. 943.[5/] As stated in Reed, supra, 297 F. 2d at 20:

> The [legality] of the discharge procedure is a justiciable issue but once the plaintiff's claim is found and declared to be without merit, the discharge procedure may continue as before. Here, . . . there is no direct judicial review of the administrative proceedings except insofar as necessary to determine the legality of prescribed administrative procedure. It is the basic procedure . . . which may be reviewed. (Court's emphasis.)

Moreover, considering the requirements of discipline, mor and efficiency in the armed services, the scope of judicial review of military discharges should certainly be no greater (i as great) than the scope of judicial review of federal employ civilian discharges. And, with respect to the latter, this Court has consistently held that judicial review is limited to

---

5/ Indeed it is apparent that some decisions of military tribunals are completely unreviewable. Thus, under Article 76, Uniform Code of Military Justice, 10 U.S.C. 876, court-martial convictions may not be reviewed at all except by way of constitutionally guaranteed habeas corpus proceedings. H.Rept. No. 491, 81st Cong., 1st Sess., p. 35; S. Rept. No. 486, 81st Cong., 1st Sess., p. 32. Yet, even in such proceedings, whe life and liberty are at stake, the scope of review is exceedi narrow. Burns v. Wilson, 346 U.S. 137.

determining whether applicable statutes and procedures have been complied with. See, e.g., Mancilla v. United States, 382 F. 2d 269 (C.A. 9); Brancadora v. Federal National Mortgage Ass'n., 344 F. 2d 933 (C.A. 9); Seebach v. Cullen, 338 F. 2d 663 (C.A. 9), certiorari denied, 380 U.S. 972. Since the scope of review is limited in those cases, we submit that, a fortiori, it is so limited when reviewing decisions concerning military personnel.[6/]

Nevertheless, despite the foregoing, appellant insists that 28 U.S.C. 1361, granting mandamus jurisdiction to all district courts, authorized the lower court to compel the Secretary to issue a more favorable discharge. This contention is completely devoid of merit.

It is clear that mandamus will issue only to compel the performance of ministerial acts. It will not lie to control an exercise of discretion by the executive branch of the Government. Panama Canal Co. v. Grace Line Inc., 356 U.S. 309; United States v. Wilbur, 283 U.S. 414; Houston v. Ormes, 252 U.S. 469; Alaska Smokeless Coal Co., v. Lane, 250 U.S. 549;

6/ Ashe v. McNamara, 355 F.2d 277 (C.A. 1), cited by appellant is fully consistent with these principles. In that case, the decision of the military tribunal was overturned because reached by procedures not permitted by law. Other instances in which the procedures utilized by the military have been found defective include Harmon v. Brucker, 355 U.S. 579; Van Bourge v. Nitze, 388 F. 2d 557 (C.A.D.C.) and Bland v. Connally, 293 F. 2d 852 (C.A.D.C.). But in each of the latter cases, the courts, having performed their assigned task of inquiring into the propriety of the procedures used, took no action on the merits but, remanded the case to the military for disposition under valid procedures.

Ness v. Fisher, 223 U.S. 683; Riverside Oil Co. v. Hitchcock, 190 U.S. 317; Marbury v. Madison, 1 Cr. 137.[7/]

This rule is equally applicable to military administrati boards whose decisions are discretionary in nature. Denby v. Berry, 263 U.S. 29; see, Runkle v. United States, 122 U.S. 54 Thus, in United States ex rel. French v. Weeks, 259 U.S. 326, a former soldier sought mandamus to compel an Army classifica board to change the nature of his discharge classification. holding that federal courts lacked the authority to compel

---

7/ This Court has been called upon many times to apply these principles. See, e.g., Finley v. Chandler, 377 F. 2d 548 (C.A. 9), certiorari denied, 389 U.S. 869; Edmunds v. Board o Examiners of Optometry, 106 F. 2d 904 (C.A. 9).

Nor does 28 U.S.C. 1361 change this result. Prior to 19 mandamus actions against Government officials were capable of being brought only in the District of Columbia. In order to allow such actions to be instituted throughout the rest of the country as well, Congress passed § 1361 as a venue provision giving all district courts mandamus jurisdiction. See, 2 Moo Federal Practice, § 4.29. But in so doing, Congress made it plain that "This legislation does not create new liability or new causes of action against the United States government." S.Rept. No. 1992, 87 Cong. 2d Sess., p. 2. See, 108 Cong. Rec. 20078. Thus, it is plain that the scope of mandamus relief theretofore existing, as well as the principles governing its issuance, remained unchanged by the new section. White v. Administrator of General Services Administration, 343 F. 2d 444 (C.A. 9); Rural Electrification Administration Northern States Power Co., 373 F. 2d 686 (C.A. 8), certiorari denied, 387 U.S. 945; Prairie Band v. Udall, 355 F. 2d 364 (C. 10), certiorari denied, 385 U.S. 83.

such an act the Supreme Court stated:

> Thus we have lawfully constituted military tribunals . . . and action by them within the scope of the power with which they are invested by law. It is settled beyond controversy that under such conditions decisions by military tribunals constituted by act of Congress, cannot be reviewed or set aside by civil courts in a mandamus proceeding or otherwise. (Emphasis added.) 259 U.S. 335.

See also, United States ex rel. Creary v. Weeks, 259 U.S. 336.

We think it significant, moreover, that such holdings are entirely consonant with Congress' intent that, at least where applicable procedures have been followed, the Navy Discharge Review Board be permitted to exercise a broad discretion not subject to judicial control.

Prior to 1944 an aggrieved member of the military, seeking to have the nature of his military discharge amended, had no recourse other than to private act of Congress. See, 40 Op. Atty. Gen. 504. At that time, the Congressional prerogative to grant or withhold clemency was not subject to review by the courts but, of course, was final.

In 1944, in order to shift the burden of considering the growing number of applications for review of discharges from it to the military, Congress passed § 301 of the Servicemen's Readjustment Act of 1944, 58 Stat. 284, 286, as amended, 10 U.S.C. 1553, setting up military discharge review boards such as the Navy Board in this case. In establishing this procedure, judicial review from the decisions of the boards was not provided for. Indeed, presumably to insure that the final prerogative

in such matters would be transferred exclusively to the milit

Congress amended its original bill to provide expressly that

the findings of these boards were to be final subject only to

review by the Secretary. 58 Stat. 286.[8/] The net result, as

seen by the Attorney General, was that:

> The correction of the record and the issuance of a new discharge [by the military] may be regarded as acts of clemency, or in mitigation, precisely comparable in effect to a successful appeal to the Congress for relief [9/] by private act. 40 Op. Atty. Gen. 504, supra.

Consequently, review of military discharges was transformed

from a legislative into an executive -- not a judicial -- fu

8/ See H.Rept. No. 1418, 78th Cong., 2d Sess (1944); 90 Con Rec. 3082; 90 Cong. Rec. 4333. In 1962, § 1553 was reenacte without substantive change. 76 Stat. 509. Cf. Michaelson Herren, 242 F. 2d 693 (C.A. 2); Updegraff v. Talbott, 221 F. 342 (C.A. 4); Gentila v. Pace, 193 F. 2d 924 (C.A.D.C.), supr

9/ See, Hearings Before the House Committee on World War Ve Legislation (S. 1767), 78th Cong., 2d Sess. pp. 11-12, 40-41 In 90 Cong. Rec. 4538, appears the following statement by Re McCormack, a member of the Committee:

> We felt some machinery should exist in the Navy Department and the War Department whereby veterans could have a review without the necessity of having their discharges corrected by specific acts of Congress. I consider this provision a powerful contribution in the right direction.

10/ Two years later Congress completed the task begun in 194 by enacting the Legislative Reorganization Act of 1946, 60 Stat. 812. Under § 207 of the Act, 60 Stat. 812, 837, board for the correction of military records were established as further avenues of recourse within the military. By § 131, 60 Stat. 812, 831 Congress, evidently pleased with the resul achieved under the new military boards, completely ended its former practice of itself reviewing applications for changes of discharge. The current version of that enactment appears in 10 U.S.C. 1552.

Thus, the holdings of the courts and the mandate of Congress compel the same conclusion -- that the prerogatives which had formerly been committed solely and exclusively to Congress have been transferred intact to the military and (barring determinations or procedures unauthorized by law) remain beyond control by the judiciary. 11/

B. Since Russell's Complaint Sought Nothing More Than Review of An Exercise of Discretion By the Military, the District Court Correctly Held That No Cause of Action Was Stated.

In light of the foregoing, it is clear that the district court could not have granted the relief requested. Appellant makes no claim that the Discharge Review Board failed to afford him any procedures or rights to which he was entitled. Indeed, it is clear that he was granted all the procedural rights set forth in the Bureau of Naval Personnel Manual. Thus, he submitted supplementary statements along with his application for review. 32 C.F.R. 724.3. He was granted, but waived, a personal appearance (R. 77). 32 C.F.R. 724.5. However, he did elect to retain counsel and was represented simultaneously by two separate attorneys at the time of the Board proceedings.

11/ Appellant asserts that since military regulations prescribe the exact nature of the discharge to be granted, under any particular situation, the decision of the Board, having to conform to those regulations, is not discretionary but ministerial. This contention was rejected in Work v. United States ex rel. Rives, 267 U.S. 175, 177, where the Supreme Court expressly noted that an act is no less discretionary just because the discretion must be exercised within limits.

Nor is there any claim that the Board procedures were otherwise outside the scope of constitutional, statutory or departmental authority in any way.

Nevertheless, appellant's principal contention here is that the decision itself of the Discharge Review Board was arbitrary because it failed, despite his youth and lack of wisdom, to upgrade the character of his discharge. But it is perfectly evident that, in this regard, appellant is really asking the courts to oversee the Board's exercise of discretion Of course, in light of the principles discussed, the district court properly declined to consider this matter. Brown v. McNa 387 F.2d 150 (C.A. 3); Ingalls v. Brown, 377 F. 2d 151 (C.A.D.C As stated in Fowler v. Wilkinson, 353 U.S. 583, 584:

> If there is injustice in the [sanction] imposed it is for the Executive to correct, for since the board of review has authority to act, we have no jurisdiction to interfere with the exercise of its discretion. That power is placed by Congress in the hands of those entrusted with the administration of military justice or if clemency is in order, the Executive. (Emphasis supplied.)

It is also suggested by appellant that, if homosexuality was the basis for the discharge, the Discharge Review Board was required to record its finding that he was in fact a homosexual (Br. 7). See 32 C.F.R. 724.17. In this connection, it is also alleged that the Board improperly disregarded a psychological report stating that Russell was not a homosexual.

However, it is clear that Russell was charged and dismissed for engaging in a homosexual act, not for being a homosexual. The Bureau of Naval Personnel Manual clearly distinguishes between the two. Thus, if a member of the armed forces is found to be homosexual or to have such tendencies, he may be granted an honorable or general discharge by reason of unsuitability. 32 C.F.R. 730.10. However, once he has actually committed a proscribed act, thereby violating the Uniform Code of Military Justice, he is subject to being separated as undesirable by reason of unfitness. 32 C.F.R. 730.12.

Appellant does not suggest, as he cannot, that this distinction is unreasonable or that it serves no valid military purpose. Certainly, therefore, since commission of a homosexual act was the basis for the discharge, the Discharge Review Board was not required to enter a finding regarding homosexuality, but only one that a homosexual act had been committed. This it clearly did (R. 68).

The psychologist's report, which was allegedly disregarded by the Board, did not negate the fact that Russell actually had committed a proscribed act. Its materiality related to the matter of clemency only. Here, there is no evidence that, in deciding whether or not clemency was appropriate, the Board failed to consider the report -- whose weight was a question for it, not for the court.

Finally, it is urged that there was some procedural irregularity connected with Russell's waiver of the right to counsel at the time of his discharge. We note initially that Russell had ample opportunity to raise this issue before the Discharge Review Board at which time he was represented, not only by his present counsel, but by service counsel as well. Since he failed to raise this issue then, he may not be heard to rely on it now. De Gorter v. Federal Trade Commission, 244 F. 2d 270 (C.A. 9); Pacific Gas & Electr Co. v. Securities and Exchange Commission, 139 F. 2d 298 (C.A. affirmed, 324 U.S. 826.[12/]

In any event, it is clear that at the time of his dischar Russell was meticulously advised of his right to counsel and t he knowingly and voluntarily waived it. He alleges no specifi facts contradicting this.

After Russell was apprised of the charges against him, hi Commanding Officer told him that he (the Commanding Officer) would recommend Russell for a general discharge. Subsequently Russell voluntarily waived the right to counsel. There is no suggestion or allegation that the Commanding Officer told

---

12/ Even at this late date appellant has additional recourse before the Board for the Correction of Naval Records. See, § 207, Legislative Reorganization Act of 1946, 60 Stat. 812, 837, as amended, 10 U.S.C. 1552; 32 C.F.R. 723.1, et seq. This Board, composed entirely of civilians, as compared with the military personnel of the Discharge Review Board, has plenary authority to grant relief even where the Discharge Review Board has denied similar relief. 41 Op. Atty. Gen. 12; see 32 C.F.R. 723.3(c). Thus the issue of waiver validly may be presented to the military for its initial consideration.

Russell of the proposed recommendation in order to induce him to waive counsel.[13/] Nor is there any evidence that Russell failed to understand that his Commanding Officer's recommendation was nothing more than advisory and not binding upon the Discharge Board. Indeed it is certain Russell must have understood that his discharge might be not general, but something else because, on June 12, he issued a statement recording his understanding that he was being considered for a discharge under other than honorable conditions (R. 51). In another statement issued the same day, Russell stated that he had been advised that he might be discharged under other than honorable conditions and that that discharge could lead him to encounter substantial prejudice in civilian life. In no case did he ever specify that it was his impression that he would be given a general discharge.

Under these circumstances, it cannot be said that the Navy Discharge Review Board abused its discretion in declining to upgrade the nature of Russell's discharge. Nor can it be said that Russell who, to this very day, admits to having engaged in a homosexual act while in the Navy, was deprived of his right to elect to retain counsel. Rather, it is plain that Russell, regretting his conduct and with full knowledge of the possible

---

13/ The Commanding Officer did in fact recommend a general discharge but the Discharge Review Board determined upon an undesirable discharge (R. 38).

consequences, voluntarily waived this right. He cannot claim otherwise now. Courtney v. Secretary of the Air Force, supra

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

EDWIN L. WEISL, Jr.
Assistant Attorney General,

SYLVAN A. JEPPESEN,
United States Attorney,

JOHN C. ELDRIDGE,
ROBERT M. HEIER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

JULY 1968.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United State Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ROBERT M. HEIER

AFFIDAVIT OF SERVICE

DISTRICT OF COLUMBIA)
) ss.
CITY OF WASHINGTON)

ROBERT M. HEIER, being duly sworn, deposes and says:

That on July 5, 1968, he caused three copies of the foregoing brief for appellee to be served by air mail, postage prepaid, upon counsel for appellant:

Cecil D. Hobdey, Esquire
James, Hobdey & Shaw
Box 176
Gooding, Idaho

ROBERT M. HEIER
Attorney,
Department of Justice,
Washington, D.C. 20530.

Subscribed and sworn to before
me this 5th day of July 1968.

[SEAL]

NOTARY PUBLIC

My Commission expires April 14, 1972.